

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

Hearing:
November 9, 2004

Mailed: February 24, 2004
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Speedbar, Inc.
v.
JEC Development, Inc.

Opposition Nos. 91124064 and 91153050

Alan S. Cooper, Alisa C. Key and Caroline C. Smith of Shaw
Pittman LLP for AutoZone Parts, Inc.

Kevin W. Bates of Hatch, James & Dodge, P.C. for JEC
Development, Inc.

Before Hairston, Walters and Bucher, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

JEC Development, Inc. has filed applications to
register the marks shown below,

CollisionZone

for services identified as "automobile repair and maintenance;"¹ and



for "automobile repair and finishing services for others."²

Speedbar, Inc. filed notices of opposition against the marks, alleging priority and likelihood of confusion and dilution, as grounds for opposition.³ Opposer (the term "opposer" is used herein to refer collectively to Speedbar, Inc. and its predecessor) specifically alleges in each opposition that it and its predecessor have continuously used the trade name, trademark and service mark AUTOZONE for retail auto parts store services and automotive products and accessories since long prior to applicant's date of first use; that opposer's AUTOZONE mark has become "an exceedingly well-known and famous mark within the meaning of §43(c) of the Federal Trademark Act" prior to applicant's date of

¹ Serial No. 76046200, filed June 12, 2000, alleging a date of first use anywhere on November 1, 1998 and a date of first use in commerce on November 1, 1999.

² Serial No. 76045639, filed May 11, 2000, alleging a date of first use anywhere on November 1, 1998 and a date of first use in commerce on November 1, 1999.

³ The oppositions were consolidated by the Board on September 29, 2003.

first use; that applicant's mark dilutes the distinctive qualities of opposer's famous AUTOZONE mark; and that applicant's mark, when used in connection with the identified services, so resembles opposer's AUTOZONE mark as to be likely to cause confusion. Opposer pleaded ownership of the following registrations:

(1) Registration No. 1,496,638 issued July 1988 (Section 8 affidavit accepted; Section 15 affidavit received) for the mark shown below,



(hereinafter referred to as "AUTOZONE and design") for "automotive batteries;"

(2) Registration No. 1,550,569 issued August 1, 1989 (Section 8 affidavit accepted; Section 15 affidavit received) for the mark AUTOZONE (typed drawing) for "retail auto parts store services";

(3) Registration No. 1,501,718 issued August 23, 1988 (Section 8 affidavit accepted; Section 15 affidavit received) for the mark AUTOZONE and design for "retail auto parts store services";

(4) Registration No. 1,700,101 issued July 14, 1992 (renewed) for the mark AUTOZONE and design for "cleaning

preparations for hands and automobiles" in class 3, and "vehicles engine parts, namely thermostats" in class 9; and (5) Registration No. 2,225,191 issued February 23, 1999 for the mark AUTOZONE and design for "windshield washing fluid."⁴

Applicant filed answers to the oppositions wherein it denied the essential allegations thereof. Further, applicant asserted the following defense in the oppositions:

Speedbar's Opposition should be dismissed because there is no likelihood of confusion between Speedbar's marks and JEC's marks because JEC only uses its marks in connection with the provision of automobile body and chassis repair and finishing services for others. There is no likelihood of confusion between Speedbar's marks and JEC's marks as JEC actually uses the marks. In the event the Board finds that Speedbar is entitled to relief with JEC's services as broadly identified, JEC is entitled to registration of its mark with a restricted identification reflecting the actual nature of its services.

PRELIMINARY MATTERS

Before turning to the record and merits of the case, we must discuss several preliminary matters. The first involves opposer's objection to exhibits 4, 5, and 6 to the testimony deposition of applicant's president and owner John Chevalier. The exhibits are purported evidence of third-

⁴ Opposer also pleaded ownership of Registration No. 1,704,811 for the mark AUTOZONE for "automobile and truck engines." However, PTO records show that this registration was canceled under Section 8 of the Trademark Act. Thus, we have given no consideration to this registration.

party use of the term "zone": exhibit 4 consists of the results of an Internet search of "parts zone"; exhibit 5 consists of the results of an Internet search of "auto parts zone"; and exhibit 6 consists of the Internet home pages of businesses with names that include "zone." Opposer maintains that during discovery, it requested applicant to produce all documents upon which applicant intended to rely to prove that there is no likelihood of confusion in this case, and that applicant failed to produce these documents.

In response, applicant maintains that it retrieved these documents only shortly before Mr. Chevalier's testimony deposition. Under the circumstances, we decline to strike the documents on the basis that they were not produced in response to discovery.

Opposer has objected to applicant's exhibit 6 also on the ground that Mr. Chevalier lacked the requisite personal knowledge to testify concerning this exhibit. As noted above, exhibit 6 consists of the Internet home pages of businesses with names that include "zone." Mr. Chevalier testified that his receptionist conducted the Internet search for these home pages. Fed. R. Evid. 602 provides that a witness may not testify with respect to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Because the foundation for exhibit 6 relies on Mr.

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Chevalier's testimony concerning a matter as to which he does not have personal knowledge, namely, a search performed by his receptionist, opposer's objection to exhibit 6 is sustained. We have not considered this exhibit in reaching our decision herein.

Further, opposer objects to a "correction" to Mr. Chevalier's testimony deposition. The testimony involves the following question:

Q. Do you envision that CollisionZone will sell automobile parts as stand-alone items in the future?

Mr. Chevalier answered "yes" to this question at the deposition. However, in the filed transcript, the answer has been changed to "no." Opposer argues that that is a material change to Mr. Chevalier's testimony and thus is not permitted. Applicant contends that it is a mere correction and reflects applicant's actual intention. There is no question that this is a material change, i.e., a direct contradiction, in the answer to the question. In view thereof, and inasmuch as opposer's counsel had no opportunity to cross-examine Mr. Chevalier in connection with his "corrected" answer, we have not considered this portion of the testimony in reaching our decision herein.

Applicant objects to the certified copy of opposer's Registration No. 2,721,079 which was introduced as exhibit J to opposer's first notice of reliance and exhibit 33 during

the testimony deposition of opposer's vice-president Anthony Dean Rose. Opposer did not plead ownership of this registration in the notice of opposition and did not seek amendment of the opposition to plead ownership thereof. We find applicant's objection to be well taken and we have not considered this registration in reaching our decision herein.

Lastly, as noted above, applicant asserted as a defense in its answers, that in the event the Board finds a likelihood of confusion vis-à-vis opposer's goods and services and applicant's services as set forth in applicant's applications, applicant is entitled to registration of its marks with a restricted identification reflecting the actual nature of its services. Opposer argues that the Board may not consider such a restriction because applicant did not file a formal motion to amend the recitation of services in its involved applications.

TBMP 514.03 (2d ed. rev. 2004) states, in pertinent part, that:

If a defendant whose application or registration is the subject of a Board inter partes proceeding, wishes to defend by asserting that it is at least entitled to a registration with a particular restriction, the defense should be raised either in the defendant's answer to the complaint, or by way of a timely motion to amend the application or registration to include the restriction. The proposed restriction should be described in defendant's pleading, or in its motion to amend, in sufficient detail to give the plaintiff fair notice thereof. (citations omitted).)

We find that applicant properly raised its defense in its answer and that applicant set forth its proposed restriction (i.e., automobile body and chassis repair and finishing services for others) in sufficient detail to give opposer fair notice thereof. Thus, if we find in opposer's favor on the issue of likelihood of confusion vis-à-vis opposer's goods and services and the services set forth in applicant's applications, we will then consider applicant's alternative defense.

THE RECORD

The record consists of the pleadings; the files of the opposed applications; the testimony deposition (with exhibits) of opposer's vice-president Anthony Rose; five notices of reliance submitted by opposer on third-party registrations, portions of the discovery deposition of applicant's president John Chevalier, and applicant's responses to interrogatories; and certified copies of opposer's pleaded registrations introduced during Mr. Rose's deposition and under notice of reliance. In addition, applicant submitted the testimony deposition (with exhibits) of its president Mr. Chevalier; and three notices of reliance on opposer's responses to interrogatories and portions of the discovery deposition of opposer's vice-president Mr. Rose.

THE PARTIES

The record shows that opposer first used the mark and trade name AUTOZONE in connection with retail auto parts store services and auto parts and accessories in November 1987. Opposer currently operates approximately 3200 retail auto parts stores throughout the continental U.S. Virtually every type of auto part and accessory is sold at opposer's stores, including products for use in auto collision repair. Opposer's sales associates are trained and encouraged to "go the extra mile" to assist customers by offering to test auto batteries, alternators, starters, solenoids, voltage regulators, oxygen sensors and other engine management type parts; and by offering to turn brake drum and rotors; provide diagnostic services that relate to the check engine light; and install parts if requested by a customer or if it appears that a customer needs help. Opposer's stores have a "LOAN-A-TOOL" program through which opposer's customers may borrow certain tools, including tools used in collision repair. Opposer also has a website at which it provides "how-to" and repair information and contains links to a third-party website that provides in-depth repair and diagnostic information and lists various parts sold in opposer's stores. Opposer's website receives approximately one million visitors per month. Opposer's customers are the general public, in particular automobile owners who are "do-

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it-yourselfers," professional automotive installers and personnel from automobile repair shops.

Opposer's AUTOZONE mark appears on signs on the exterior of opposer's retail stores, on freestanding signs outside of the stores, on banners, posters and other point-of-sale materials inside the stores, and on products sold in the stores. Opposer advertises its services and products in newspapers, on radio and television, including cable channels such as The Discovery Channel, Home & Garden TV, Speed Channel, MTV, DIY Network, CNN, TBS, TNT, Lifetime, VH-1, and traditional broadcast channels including ABC, CBS, NBC and FOX.

Opposer's television advertising reaches approximately ninety-six percent of the general population 38 times per year. Opposer's radio advertising reaches approximately ninety-six percent of the U.S. population approximately 144 times per year. Opposer's other advertising efforts include billboards, Yellow Pages advertising, direct mail advertising, magazine advertising, and appearance of the AUTOZONE mark on the sides of tractor-trailers transporting goods for sale in opposer's stores. In addition, opposer advertises at the indoor arenas and stadiums where professional sports teams play, including the Delta Center in Salt Lake City, Utah where the Utah Jazz basketball games are held. Game season schedules such as pocket schedules

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for the Utah Jazz basketball team also display the AUTOZONE mark.

Opposer's net sales of auto parts and accessories have increased from more than one billion dollars in 1992 to approximately 5.5 billion dollars in fiscal year in 2003. In addition, since 1987 opposer has spent in excess of \$330,000,000 in advertising and promoting its automotive parts store services and related parts and accessories.

Further, opposer has policed its mark by taking action against what it considers to be infringing uses of marks containing the term "zone."

Applicant JEC Development, Inc. has two locations in Salt Lake City, Utah where it performs automobile body and chassis repair. Applicant began business in November 1998. According to applicant's president, Mr. Chevalier, he came up with the mark COLLISIONZONE during a fishing trip with a friend. The friend's boat was named "Twilight Zone." Mr. Chevalier liked the name and settled on COLLISIONZONE. The vast majority of applicant's customers are members of the public who have been involved in automobile accidents and are referred to applicant by insurance adjusters. The remainder of applicant's customers are referrals to applicant by automobile dealerships and individual walk-in traffic. The nature of applicant's business requires the

employment of sophisticated and specialized tools and equipment costing many thousands of dollars.

PRIORITY

Priority is not at issue with respect to the services and goods identified in opposer's pleaded registrations, namely, retail auto parts store services, automotive batteries, cleaning preparations for hands and automobiles, thermostats, and windshield washing fluid. See *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

LIKELIHOOD OF CONFUSION

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). We also must bear in mind that the fame of a plaintiff's mark, if it exists, plays a "dominant role in the process of balancing the

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DuPont factors." *Recot Inc v. M.C. Becton*, 214 F.3d 1322, 1327, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000).

Fame of Opposer's Mark

As noted, we are required to consider evidence of the fame of opposer's mark and to give great weight to such evidence if it exists. See *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, supra; *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir 1992).

Fame of an opposer's marks or mark, if it exists plays a "dominant role in the process of balancing the DuPont factors." *Recot*, 214 F.3d at 1327, 54 USPQ2d at 1897, and "[f]amous marks thus enjoy a wide latitude of legal protection. *Id.* This is true as famous marks are more likely to be remembered and associated in the public mind than a weaker mark, and are thus more attractive as targets for would-be copyists. *Id.* Indeed, "[a] strong mark ... casts a long shadow which competitors must avoid." *Kenner Parker Toys*, 963 F.2d at 353, 22 USPQ2d at 1456. A famous mark is one "with extensive public recognition and renown." *Id.*

Bose Corp. v. QSC Audio Products Inc., supra, 63 USPQ2d at 1305.

In this case, we find that opposer's AUTOZONE mark is indeed a famous mark in the field of retail auto parts store services. Opposer has used its AUTOZONE mark for over 15 years and now has some 3200 retail auto part stores in the continental U.S. Opposer has advertised in virtually every medium and its advertising and promotional expenditures have

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totaled over \$330,000,000 since 1987. Opposer's television advertising reaches approximately ninety-six percent of the general population 38 times per year and its radio advertising reaches approximately ninety-six percent of the U.S. population approximately 144 times per year. Opposer's website receives approximately one million visitors per month. Since 1992 opposer's net sales have increased five-fold and totaled 5.5 billion dollars in 2003.

Based on this evidence, we find that opposer's AUTOZONE mark is famous. We recognize that opposer has not placed its sales and advertising figures in context, i.e., we do not know how substantial these figures are in terms of businesses that offer retail auto parts store services. However, we do not believe that is necessary here in view of the volume of sales and advertising expenditures and the fact that practically the entire U.S. population is reached by opposer's advertising numerous times each year. In this regard, we note that our primary reviewing Court has accepted sales and advertising figures as indicia of the fame and strength of a mark even in the absence of the context for such figures. See *Bose Corp. v. QSC Audio Products Inc.*, supra, 63 USPQ2d at 1306.

Similarity of the Marks

We first must determine whether applicant's marks as shown below,

CollisionZone



and opposer's marks AUTOZONE (typed drawing) and

AutoZone

when compared in their entireties in terms of appearance, sound and connotation are similar or dissimilar in their overall commercial impressions. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods/services offered under the marks is likely to result. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ2d 106 (TTAB 1975).

Furthermore, although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another and it is not

improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Initially, we find that in applicant's mark CZ COLLISIONZONE and design, the dominant feature of the mark is the term COLLISIONZONE. The "CZ" design adds little impact to the commercial impression of the mark as it simply reinforces the letters "C" and "Z" as they appear in the term COLLISIONZONE. Also, it is the term COLLISIONZONE that persons would use in calling for applicant's services. Thus, the "CZ" design element is subordinate matter. Similarly, we find that in opposer's mark AUTOZONE and design, the dominant feature of the mark is the term AUTOZONE. The design element adds little to the commercial impression of opposer's mark and it is the term AUTOZONE that persons would use in calling for opposer's services. Thus, while we do not ignore the respective design elements in opposer's and applicant's marks, we find that they do not suffice to distinguish the marks in terms of overall commercial impression.

Each of the respective marks consists of the distinctive term "ZONE" preceded by a descriptive/highly suggestive term which pertains to automobiles; "AUTO," in

opposer's case, signifying automobiles, and "COLLISION", in applicant's case, signifying automobile collision repair.

Also, the term COLLISIONZONE in applicant's marks as shown below,



is displayed in a very similar fashion to the term AUTOZONE in opposer's AUTOZONE and design mark as shown below,



The term AUTOZONE in opposer's mark is slanted forward and the first letter of "AUTO" and "ZONE" is capitalized. Similarly, the term COLLISION in applicant's marks is slanted forward and the first letter of "COLLISON" and "ZONE" is capitalized.

In addition, because both parties' marks include the word "Zone," there are consequent similarities in connotation. Opposer's marks AUTOZONE and AUTOZONE and design suggest a place where automobile parts and supplies may be purchased. Applicant's marks COLLISIONZONE and CZ COLLISIONZONE and design suggest a place where automobiles

are repaired after a collision. Both opposer's and applicant's marks then suggest a place for automobile-related services.

Finally, with respect to the sound of the respective marks, there is some similarity to the extent that they end with the word "ZONE." While we recognize that there is no similarity between the first words in the parties' marks, this difference is outweighed by the other similarities in the marks.

For the reasons discussed above, and particularly in view of the fame of opposer's AUTOZONE mark, we find that when the parties' marks are compared in their entireties, they are similar in commercial impressions.

Similarity of the Services

We turn next to a consideration of opposer's most relevant goods and services, namely retail auto parts store services, and applicant's automobile repair and maintenance and automobile repair and finishing services for others.⁵ It is well established that the services of the parties need not be similar or competitive, or even that they move in the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective services of the parties are related in some manner, and/or that the

⁵ Opposer's evidentiary record is primarily devoted to its retail auto parts store services, and as we have found, opposer's AUTOZONE mark is famous in this field.

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conditions and activities surrounding the marketing of the services are such that they could or would be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. See *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978); *Monsanto Company v. Enviro-Chem Corporation*, 199 USPQ 590 (TTAB 1978).

Opposer's services, as identified in the relevant registration, are retail auto parts store services. As shown by the testimony, opposer's services are directed to the general public, primarily do-it-yourselfers, professional automotive installers, and personnel from automobile repair shops.

Applicant's services, as identified in the involved applications, are automobile repair and maintenance and automobile repair and finishing services for others. As shown by the testimony, applicant's services are offered to the general public usually by way of referral by insurance adjusters.

Comparing the parties' services, we find that although not competitive, they nonetheless are sufficiently related in the marketplace that confusion is likely to result from contemporaneous use of the marks. In this regard, opposer made of record seven third-party registrations in which

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"retail auto parts store services" and "auto repair and maintenance services" are included in the recitation of services. Although these registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, they nevertheless are probative evidence to the extent that they suggest that the services identified therein are of a type which emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988).

In this case, both parties are offering services that pertain to the maintenance and repair of automobiles. Also, the relevant classes of purchasers for the respective services are the same or overlapping. Further, notwithstanding applicant's argument to the contrary, purchasers and users of the parties' services are ordinary consumers who are not necessarily sophisticated.

Opposer has shown that in addition to using the AUTOZONE mark for its retail auto parts services, it has also established prior use of the mark on auto parts and accessories themselves. Further, opposer has shown that it offers testing, repair, diagnosis and installation of automotive parts and accessories at its stores. Because of the range of goods and services in connection with which opposer has used the AUTOZONE mark, persons would be likely

to believe that applicant's automobile repair, maintenance and finishing services offered under the marks COLLISIONZONE and CZ COLLISIONZONE and design are somehow affiliated with or sponsored by opposer.

Further, we find that there is a likelihood of confusion even with respect to opposer's retail auto store services and applicant's actual services, i.e., automobile body and chassis repair and finishing services. In this regard, opposer made of record three third-party registrations in which "auto retail parts store services" and "auto body repair services" are included in the recitation of services. Again, these respective services pertain to the maintenance and repair of automobiles; the relevant classes of purchasers are the same or overlapping; and the purchasers are ordinary consumers who are not necessarily sophisticated. In short, applicant's proposed restriction to the recitation of services in its involved applications would not overcome the likelihood of confusion.

Third-party Use

We recognize that evidence of widespread and significant use by third parties of marks containing an element in common with the mark being opposed can serve to demonstrate that confusion is not likely to occur. This is because the presence in marks of a common element extensively used by others, unrelated as to source, may

cause purchasers to not rely upon such elements as source indicators, but to look to other elements as a means of distinguishing the source of the goods and/or services.

Hilson Research Inc. v. Society for Human Resource Management, 27 USPQ2d 1423 (TTAB 1992).

In this case, however, the evidence provided by applicant is not sufficient to show that the public has had such widespread exposure to "ZONE" marks. The evidence consists simply of the results of an Internet search of "auto parts" and "auto parts zone." This search reveals three "hits" of purported marks or trade names that include "ZONE": VWBugzone.com"; Hondazone.com"; and "ONLINE Parts Zone.com." Apart from the fact that this shows at most three third-party uses, the evidence is of very limited probative value as there is no information about the extent of use or promotion of these uses. In short, this limited evidence does not prove that opposer's AUTOZONE mark is weak and that confusion is unlikely. To the contrary, as we have already found, opposer's AUTOZONE mark is a famous mark that is entitled to a broad scope of protection. Moreover, we note that the record shows that in four instances, opposer has taken action, ranging from a federal civil action to a petition to cancel in the United States Patent and Trademark Office, with respect to what it considers to be infringing uses of marks containing the term ZONE. At the time of

trial, three of these proceedings had been resolved in a manner favorable to opposer.

Actual Confusion

Opposer relies on an incident relayed by applicant's president, Mr. Chevalier, as evidence of actual confusion. Mr. Chevalier testified that a telephone call was received at applicant's business wherein the caller asked whether he/she had reached AUTOZONE. We are not persuaded that this is evidence of actual confusion, particularly since it appears there was at least a question in the caller's mind as to whether he/she had reached AUTOZONE. In any event, the fact that there may well be no evidence of actual confusion does not persuade us to find that confusion is not likely. Evidence of actual confusion is not a prerequisite for finding likelihood of confusion. Moreover, it is well recognized that evidence of actual confusion is notoriously difficult to obtain.

CONCLUSION

When all of the relevant du Pont factors are considered, including the similarity of the identified services, the range of opposer's goods and services, the commercial impressions of the marks, the fame of opposer's mark, and the lack of sophistication of purchasers/users of opposer's and applicant's services, we find that applicant's use of COLLISIONZONE and CZ COLLISIONZONE and design for

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"automobile repair and maintenance" and "automobile repair and finishing services for others" respectively, is likely to cause confusion with respect to the retail auto parts store services offered by opposer under its marks AUTOZONE and AUTOZONE and design. In particular, persons familiar with opposer's retail auto parts stores under the marks AUTOZONE and AUTOZONE and design, upon encountering applicant's automobile repair, maintenance and finishing services under the marks COLLISIONZONE and CZ COLLISIONZONE and design, are likely to believe that such services are affiliated with or sponsored by opposer.

DILUTION

Having found a likelihood of confusion in this case, we need not reach opposer's dilution claim.

Decision: The opposition is sustained as to each of applicant's involved applications on the ground of likelihood of confusion.